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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	MM Docket No. 00-10
Establishment of a Class A	)	MM Docket No. 99-292
Television Service	)	RM-9260

PETITION FOR RECONSIDERATION

UNIVISION COMMUNICATIONS INC.

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Dated: June 9, 2000

SUMMARY

Univision Communications Inc. ("Univision") hereby seeks reconsideration of the rules and regulations adopted by the Commission to implement the Class A television service. While Univision generally supports the initial eligibility requirements and other rules adopted by the Commission pursuant to the Community Broadcasters Protection Act of 1999 ("CBPA"), the creation by the Commission of certain additional requirements that stations must meet in order to maintain Class A status goes beyond the CBPA and threatens the very service that the CBPA seeks to protect.

Despite the Commission's erroneous and unsupported conclusion that the CBPA requires that Class A stations indefinitely continue to air three hours per week of locally produced programming or lose their Class A status, the CBPA has no such requirement. Moreover, such a requirement ignores the intent of the CBPA to use local programming aired in the 90 days prior to adoption of the CBPA only as an initial indicator of high-quality low-power stations deserving of protection, and not as an absolute programming edict for the future. It is certainly incongruous to require that Class A stations comply with the rules for full-power television stations in order to receive similar interference protection, but then also add a local programming mandate that even full-power stations do not have to meet.

The Commission's Report and Order then compounds the harm of an ongoing local programming requirement by adopting an overly restrictive definition of what qualifies as "local" programming. By requiring that local programming be produced within a station's Grade B contour, the Commission not only makes it more difficult and expensive to continuously meet a local programming requirement, but prevents Class A stations from using higher quality

production facilities that are available in their DMA but which are not located within their limited Grade B contours. As a result, the quality and breadth of local programming will suffer.

For similar reasons, the main studio requirements applicable to Class A television stations are unduly onerous. The obligation to locate the main studio within the Grade B contour of the Class A station treats Class A television stations unfairly with respect to radio stations with similar or smaller coverage areas, while unnecessarily diverting funds from programming to the creation of redundant brick and mortar facilities. Like the Commission's restrictive definition of local programming, the requirement that Class A stations have a main studio within their Grade B contour unnecessarily increases costs while preventing such stations from utilizing more advanced production facilities located outside of their Grade B contour. The result is less money for all types of programming, and lower quality local programming.

Finally, as Univision discussed in its Comments in this proceeding, the Commission should clarify that the failure of a station to meet any of the ongoing requirements of a Class A license will be treated as a rule violation meriting an appropriate fine or other sanction, but will not result in the loss of Class A status. Making Class A status a "now you have it, now you don't" proposition would be completely unworkable, introducing great uncertainty into the Commission's television engineering databases, making it impossible for Class A stations to obtain working capital, and ultimately dooming the entire Class A service to extinction as inevitable, but temporary, technical or financial problems eliminate stations one by one from Class A status.

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PETITION FOR RECONSIDERATION

Univision Communications Inc. ("Univision"), by its attorneys, hereby respectfully petitions for reconsideration of the Commission's Report and Order, FCC 00-115 (released April 4, 2000) (the "Report and Order") adopting regulations implementing the Community Broadcasters Protection Act of 1999 ("CBPA").[1/]

INTRODUCTION

Univision, through Univision Television Group, Inc. ("UTGI"), indirectly owns and operates twelve full-power television stations and seven low-power television ("LPTV") stations. Each of the UTGI LPTV stations provides its local Hispanic community with the nation's most popular Spanish-language programming 24 hours a day, seven days a week. Each of the UTGI LPTV stations also qualifies for Class A status under both the CBPA and the Commission's rules

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[1/] The Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), *codified at* 47 U.S.C. § 336(f).

adopted in the Report and Order.[2/] The UTGI LPTV stations timely filed their Statements of Eligibility for Certification of Class A status, and those Statements have now been accepted by the Commission.[3/] As a result, Univision anticipates the grant of Class A licenses for each of its LPTV stations upon the filing of applications. Thus, the rules governing the operation of Class A stations adopted by the Commission in the Report and Order are of great importance and concern to Univision.

As the owner of both full-power and low-power television stations, Univision appreciates that Congress struck a delicate balance in the CBPA between protecting LPTV stations that have provided their communities with exemplary programming, and allowing full-power NTSC and DTV stations adequate interference protection and flexibility to protect our existing system of free, over-the-air broadcasting.[4/] However, in creating its rules for maintaining Class A status, the Commission upset that balance by imposing unnecessary obligations on Class A licensees that far exceed those which are required of even full-power stations.

[2/] Univision's full-power stations include KDTV(TV), San Francisco, California; KFTV(TV), Hanford (Fresno), California; KMEX-TV, Los Angeles, California; KTVW-TV, Phoenix, Arizona; KUVI-TV, Bakersfield, California; KUVN(TV), Garland (Dallas), Texas; KUVS(TV), Modesto (Sacramento), California; KWEX-TV, San Antonio, Texas; KXLN-TV, Rosenberg (Houston), Texas; WGBO(TV), Joliet (Chicago), Illinois; WLTV(TV), Miami, Florida; and WXTV(TV), Paterson (New York), New Jersey. Univision's LPTV stations include K30CE, Austin, Texas; KABE-LP, Bakersfield, California; KDTV-LP, Santa Rosa, California; KUVE-LP, Tucson, Arizona; KUVN-LP, Fort Worth, Texas; W47AD, Hartford, Connecticut; and WXTV-LP, Philadelphia, Pennsylvania. These stations serve fifteen of the largest Hispanic markets, including nine of the top ten U.S. television markets.

[3/] See "Certificates of Eligibility for Class A Television Station Status," Public Notice, DA 00-1224, released June 2, 2000.

[4/] See H.R. Rep. No. 464, 106th Cong., 1st Sess. (1999).

I. Despite an Assertion to the Contrary in the Report and Order, the CBPA Does Not Require Qualifying Low-power Television Stations to Continue to Air Three Hours Per Week of Locally Produced Programming in Order to Retain Class A Status

As the Commission stated in its Report and Order, the CBPA "was designed to permit a one-time conversion of a single pool of LPTV applications that met specific criteria before the statute was enacted."[5/] The creation by Congress of Class A protection as a reward for past exemplary service by LPTV stations is clear in the words of the CBPA, which states that "[s]ince the creation of low-power television licensees by the Federal Communications Commission, a small number of license holders have operated their stations in a manner beneficial to the public good providing broadcasting to their communities that would not otherwise be available."[6/]

In its Report and Order, however, the Commission erroneously interprets the CBPA as protecting not those who "have operated their stations in a manner beneficial to the public good," but only those who also commit to air specified amounts of local programming *in the future*, even if other programming better serves the public from time to time. Specifically, the Commission's newly adopted Section 73.6001(b) mandates that Class A television stations "broadcast an average of at least three hours per week of locally produced programming each quarter." This requirement appears to be based on the Commission's erroneous belief that "in addition to requiring Class A applicants and licensees to comply with the operating requirements for full-power television stations, the CBPA also requires that Class A licensees continue to meet

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[5/] Report and Order at ¶ 12.

[6/] Id. (citing CBPA Section 5008(b)(1).

the eligibility criteria established for a qualifying low-power station in order to retain Class A status."[7/]

The portion of the CBPA that the Commission appears to be referring to is Section 336(f)(1). That section provides: "Each such Class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualified low power station in paragraph 2." However, the plain language of paragraph 2 -- Section 336(f)(2) -- negates the Commission's interpretation. Under that section, a qualified Class A television station must meet the following requirements:

> (A)(I) during the 90 days preceding the date of enactment of the Community Broadcasters Protection Act of 1999 --
>
> (I) such station broadcast a minimum of 18 hours per day;
>
> (II) such station broadcast an average of at least 3 hours per week of programming that was produced within the market area served by such station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; and
>
> (III) such station was in compliance with the Commission's requirements applicable to low-power television stations; *and*
>
> (ii) from and after the date of its application for a class A license, the station is in compliance with the Commission's operating rules for full-power television stations; or
>
> (B) the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.[8/]

[7/] Report and Order at ¶ 30.

[8/] 47 U.S.C. § 336(f)(2) (emphasis added).

The placement of the word "and" at the end of subsection (f)(2)(A)(I)(III) makes clear that there are two separate components of section (f)(2)(A) -- requirements that must be met during the 90-day period prior to November 29, 1999 (subsections (A)(I, II, and III)), and requirements that must be met on an ongoing basis (subsection (A)(ii)).

The requirement in section (f)(2)(A)(ii) that Class A stations continue to operate in compliance with the regulations applicable to full-power television stations creates a multitude of ongoing obligations. Among them are: airing three hours per week of core children's educational programming, maintaining a main studio, maintaining a local public inspection file, filing Children's Television Programming Reports, preparing quarterly issues/programs lists, and complying with the EEO and EAS rules. Requiring that Class A television stations meet the same operating requirements as full power television stations is entirely consistent with their new primary status, whereas requiring Class A stations to do even more than full power television stations is incongruous.

Thus, when Section 336(f)(1) states that: "Each such Class A licensee shall be accorded primary status as a television broadcaster as long as the station continues to meet the requirements for a qualified low power station in paragraph 2," it literally means that the qualifying station must have met the requirements of section (f)(2)(A)(I)(I, II, and III) during the specified 90-day period, and must meet the requirements of (f)(2)(A)(ii) on a continuing basis. Any other reading of Section (f)(2) overlooks the express language of that section.

With Congress having explicitly established the eligibility criteria for Class A status in the CBPA, and the CBPA requiring the Commission to grant the Class A applications of those stations meeting the statutory criteria, the addition of a continuing local programming obligation

conflicts with the CBPA and the intent of Congress to reward community-oriented broadcasters without limiting their programming flexibility. The initial eligibility requirements, which include the three hours per week of local programming requirement, served to identify those stations that have historically provided exemplary local service to their communities and therefore merit protection from interference in the same manner as full-power television stations. Mandating that Class A stations provide three hours per week of local programming in order to retain their Class A status impinges on the broadcaster discretion that Class A licensees exercised to qualify for Class A status in the first instance.

If a Class A licensee makes the good faith determination that programming produced in another market serves his or her own community better than anything that can be produced locally, or that the high production cost of local programming cannot be justified when those financial resources could be used to improve the quality of programming purchased from third parties, the Commission should not interfere with that judgment, and the CBPA does not permit continued Class A eligibility to be jeopardized by the exercise of such licensee discretion. Inasmuch as Class A licensees are being rewarded for their exemplary programming decisions and the resulting service provided to the public prior to enactment of the CBPA, they should be granted the same freedom of programming discretion permitted their full-power television counterparts.

II. If an Ongoing Three-Hour Local Programming Obligation Is Implemented, the Definition of the Programming That Qualifies as Local Should Be Modified

If the Commission nevertheless retains the requirement that Class A television stations air three hours per week of locally produced programming in order to retain Class A status, it should

modify the definition of what qualifies as local programming. In the Report and Order, the Commission determined that programming produced in the same DMA as a Class A station, but outside of the station's Grade B contour, will not count towards the three hour local programming requirement. Such a limited definition of local programming ignores the economics of television production and discourages high-quality local programming in favor of poor quality hyper-local programming.

The Commission has long recognized that television tends to be a regional, rather than a local, service.[9/] While this is partially based on the large coverage areas of many television stations, it is also based on a recognition of the economics of television production. Unlike radio, broadcast quality television production is extremely expensive, and requires a substantial audience to generate sufficient advertising revenue to fund such production. Few LPTV stations have access to audiences of this size, and must therefore take advantage of partnerships with full-power stations in their DMA to obtain the economies, expertise, and production equipment necessary to produce high-quality local programming. This is particularly true for foreign language stations, whose audiences typically represent only a fraction of the overall viewing public in their service areas. Adopting an overly restrictive definition of local programming is therefore particularly harmful to foreign language stations and the audiences they serve.

[9/] "[P]erhaps more than any other genus of broadcast facility, a television station is expressly intended as a 'regional' facility rather than a purely 'local' outlet." Debra D. Carrigan, 100 FCC 2d 721, 728 n.16 (Rev. Bd. 1985) (subsequent history omitted); see also J.B. Broadcasting of Texas, Inc., 100 FCC 2d 822 (Rev Bd. 1985) (subsequent history omitted) ((stating, "television stations--unlike radio stations--are generally considered as providing 'an area wide, rather than localized service'")(quoting St. Louis Telecast, Inc., 22 FCC 625, 713 (1957))).

For example, Univision operates a full-power television station licensed to Garland, Texas, and an LPTV station eligible for Class A television status licensed to Fort Worth, Texas. Both stations serve the Dallas-Fort Worth DMA, with the full-power station providing service to Dallas, and the LPTV station serving Fort Worth. The LPTV station's News Bureau in Fort Worth produces news segments concerning events in Fort Worth that are then incorporated into the local news programming originated at the Garland station, which is then broadcast over both stations. As is the case in most major markets, Univision has determined that the news segments from Fort Worth are of interest and importance to the viewers in the Dallas-Fort Worth DMA generally, and that the portion of the news from the Dallas station is equally of importance to viewers in Fort Worth.

However, because the news is produced using the brand new, state-of-the-art facilities at the full-power station, the Commission's Report and Order would give the Fort Worth LPTV station no or very little local programming credit, despite the fact that it is airing many hours of local news that are produced within the DMA by the licensee of both the LPTV and full-power stations. Even if a separate Fort Worth news program were somehow economically feasible, the Report and Order would forbid producing such a program at the full-power station's state-of-the-art facilities, requiring instead that a program of inferior quality -- but which is produced at facilities inside the LPTV's Grade B contour -- be aired instead. Such a result is nonsensical.

Furthermore, by using such a restrictive definition of local programming, the Commission prevents all Class A stations from taking advantage of more technologically advanced or economically reasonable production facilities that are already located in their DMA but not within their Grade B contour. As a result, the rules adopted by the Commission in the

Report and Order have the perverse effect of discouraging Class A stations from airing high-quality news and public affairs programming produced in their DMA in favor of airing VHS quality videos of dance recitals performed by the station owner's daughter within the station's Grade B contour. Such a result was clearly not intended by Congress in enacting the CBPA, and will eviscerate the public service-oriented programming the CBPA was designed to protect.

Univision therefore urges the Commission to reconsider its decision to deem programming as local only if produced within a Class A station's Grade B contour. Using instead a DMA-based standard for local programming would provide Class A stations with the flexibility to maximize the quality of their local programming while making the production of such programming more economical. The cost of equipping even a low-technology video production facility within a station's Grade B contour is extensive, and will divert scarce financial resources from the local programming itself. Moreover, because broadcast programming and program distribution already tends to be DMA-based, using a DMA-based definition of local programming will simplify the determination of local programming and thereby avoid unnecessary and complicated disputes over which side of the Grade B contour line a program was produced. Programming should be considered local if it is produced within the DMA of the Class A station.

III. The Commission Should Amend the Main Studio Rule Requirements Applicable to Class A Television Stations

Another way in which the Report and Order inadvertently harms the ability of Class A stations to provide high-quality local programming is by limiting to a station's Grade B contour the area in which a Class A station can locate its main studio, as opposed to the more expansive

area allowed all other broadcasters under Section 73.1125 of the Commission's Rules.[10/] On its face, the creation of a more restrictive main studio standard for Class A stations would appear to conflict with the Congressional instruction that Class A stations be required to comply with the operating rules applicable to full-power television stations.[11/] Even if this were not the case, however, there is no justification for applying a more stringent restriction on the location of a Class A television main studio than on a Class A FM main studio.

In the Report and Order, the Commission noted that the Grade B contours of Class A televisions stations extend only 20 to 25 miles and are therefore smaller than the Grade B contours of many full-power stations. The Commission then stated that Class A television station main studios must be located within their Grade B contours in order to be accessible to the public they serve.[12/] However, the Commission did not explain why Class A television station main studios must be more accessible to the public than the main studios of, for example, Class A FM stations, whose service contours are at least as limited as those of LPTV stations. Moreover, the Commission's recent changes to the public inspection file rule requiring that licensees now respond to telephone inquiries regarding the contents of their public inspection files and mail requested items to residents in their Grade B contour[13/] alleviates any inaccessibility that might result from permitting Class A stations to take advantage of the provisions of Section 73.1125 applicable to all other broadcasters.

[10/] Report and Order at ¶ 25.

[11/] See 47 U.S.C. § 336(f)(2)(A)(ii).

[12/] Report and Order at ¶ 25.

[13/] *See* 47 C.F.R. § 73.3526(c)(2)(I).

By providing Class A stations with the same flexibility in locating their main studios that all other broadcast stations enjoy, the Commission will increase the ability of Class A stations to co-locate their main studios with other full or low-power stations, or with the facilities of independent video production houses. This will allow Class A stations to conserve their financial resources for programming while obtaining access to more advanced and extensive video production facilities than they could possibly afford on their own. As a result, allowing Class A stations to locate their main studios in accordance with Section 73.1125 will create many programming benefits to the public, while providing the public with the same level of main studio access that they receive from all other broadcasters.

IV. The Commission Should Clarify That the Failure to Meet One of the Continuing Obligations of Holding a Class A License May Subject the Licensee to Sanctions, But Will Not Affect a Station's Class A Status

In its Comments, Univision urged the Commission to clarify that once a station has obtained Class A status, the station's failure at any point in the future to meet its obligations as a Class A licensee will be grounds for issuing sanctions, but will not affect the station's underlying Class A status.[14/] This approach is used by the Commission for all other broadcast services, and there is ample reason to apply such an approach to the Class A service as well.

In spite of this, the Commission seems to indicate in the Report and Order that failure to meet any continuing obligation of Class A status will result in the loss of that status, particularly

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[14/] While Section 336(f)(1) of the CBPA requires the Commission to accord primary status to a Class A station "as long as the station continues to meet the requirements for a qualified low power station in paragraph 2," the CBPA appears to leave to the Commission's discretion whether to continue to accord primary status to a Class A station that is not meeting all of the requirements of Section 336(f)(2).

where a licensee fails to meet the Commission's local programming obligations. As discussed above, the CBPA does not permit the Commission to condition the grant of Class A status on a station's continued provision of local programming. However, connecting a station's continued Class A status to that or any other governmental requirement is unnecessary and counterproductive. Class A status should be permanent, and not subject to revocation unless the broadcast license itself is revoked.

For example, allowing a station's future local programming to affect its Class A status would yield a completely unworkable result. The Commission's engineering databases would be in a constant state of flux, with full-power stations unable to determine which stations truly qualify for Class A interference protection. Many facility modification applications for full-power television stations would be accompanied by a request for a Declaratory Ruling that a specific station be reclassified as an LPTV rather than as a Class A station based on an alleged lack of local programming. Thus, the Commission could be required to issue to Class A operators Notices to Show Cause and to engage in fact finding regarding Class A stations' local programming offerings before it can dispose of simple facilities modification applications. This would add yet another level of complication to video services application processing, which is already encumbered by the need to analyze both the NTSC and DTV implications of a modification proposal before it can be approved.

Such an approach would also undercut the intent of Congress in enacting the CBPA. As the Commission itself noted in this proceeding, Congress recognized the uncertainty that is created by LPTV stations' secondary status, and that this uncertainty "affects the ability of LPTV

stations to raise necessary capital."[15/] Congress therefore sought to end this uncertainty by according primary status to Class A stations through the CBPA. However, just as banks are hesitant to loan money to LPTV stations that could be forced off the air tomorrow because of their secondary status, they will be equally hesitant to lend money to Class A stations that could be forced off the air tomorrow because their Class A status is not permanent. If licensees and their lenders cannot be assured that Class A stations will continue to be protected from interference and displacement in the future, they cannot make the long-term financial and programming commitments necessary to expand and improve service to the public.

Finally, it is unreasonable for the Commission to expect Class A licensees to make the major investment in building and staffing a main studio, and meeting the many other regulatory obligations of full-power stations, if Class A status and the protection it affords are transitory. The Commission must therefore make clear that Class A status is permanent, and that any failure to meet all of the obligations of a Class A licensee will not result in revocation of a station's Class A status.

CONCLUSION

For the reasons set forth above, Univision encourages the Commission to reconsider its requirement that Class A television stations continue to broadcast three hours per week of local programming in order to retain their Class A status. In the alternative, if the Commission chooses to retain the three-hour per week local programming requirement, it should deem programming to be local as long as it is produced within the DMA of the Class A station. The

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[15/] In the Matter of Establishment of a Class A Television Service, Order and Notice of Proposed Rule Making, MM Docket No. 00-10 (Jan. 13, 2000), at ¶ 5.

Commission should also allow Class A stations the same flexibility accorded other broadcast stations under Section 73.1125 of the Commission's Rules in locating their main studios, and should clarify that Class A status is permanent and not subject to revocation for any failure to comply with the Class A rules.

Respectfully submitted,

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